

22 Years of Polish Constitution: Of Lessons not Learnt, Opportunities Missed, and Challenges still to be Met

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In memory of Tadeusz Mazowiecki,

Prime Minister of the first non-communist government in Central and Eastern Europe,

the spiritus movens of the Polish Constitution of April, 2, 1997

The Polish constitution, unlike the German which will celebrate its 70th on 23 May of this year, has no big birthday scheduled this year. Nevertheless, the 22nd anniversary of the Polish constitution on 2 April offers a good opportunity to ponder about the Constitution's performance so far, to appreciate its resilience, to celebrate its many achievements and, last but not least, to map out its possible future trajectory. Tracking the birth and life of this constitutional document takes on special importance today at the height of the Polish counterrevolution. Many virtues of the Constitution got lost amidst the ongoing humiliation that the Constitution has been subject to at the hands of the right-wing government. The latter keeps portraying it as an elitist document that allegedly never served the interests of true Polish people and one that betrayed the ethos of the Solidarity movement. A rejoinder to this narrative is very much in order.

A new constitutional narrative on the rise

The 1997 Constitution is rejected by the ruling PIS party as an extension of the rotten compromise struck during the Round Table Talks in 1989. Kaczynski's mantra is that "true Polish constitution" was never adopted post-1989. According to him an opportunity presents itself now to finally adopt a righteous constitution for Polish people. The constitutional document of PIS would not only entrench its grip on power, but first and foremost fortify its leader's outrageous rewriting of post-1989 history (allegedly, Poles owe the 2004 EU Accession to the efforts of the Kaczyński brothers, while NATO membership has been [secured thanks to none else than Jarosław Kaczyński](#), to name but two examples of many, while Lech Wałęsa is now [cast aside](#) as a traitor and collaborator with the communists ...)

What about the main "culprit" then: the 1997 Constitution?

Understanding the “here and now” by looking back

After 1989, day-to-day politics and the effort of patching together a disjointed political scene quickly overshadowed the peaceful transition. Choices of constitutional design hardly explain the real failures in leadership and frailties in temperament that ensued post-1989. Paradoxically, if anybody is to blame for the disintegration of *Solidarność* in the 1990's, and for the gradual erosion of its myth(s), it has been the leaders themselves who lost the very spirit that brought them together in the 70's and 80's. Constitution-making process is a function of political context and what is possible in the factual and legal register. In the Polish case the factual was dominated by the temperamental deficiencies of the Polish leading revolutionary Lech Wałęsa. Polish People did not turn their back on politics just because it failed to bring forth a reasonable constitutional compromise after 1989, or because a wrong constitutional blueprint was chosen at the Founding. We always excelled in instinctive and emotional resistance against the dark forces that plotted against our country. Victimization and messianism were used to explain, and justify, the special place of Poland in history, as opposed to the allegedly boring and uninspiring process of political compromise.

Would then a revolutionary and imaginary constitution of 1991/1992 really have made any difference as is often claimed by those who oppose the Round Table Talks of 1989? Would such a document have been treated any differently than the Constitution of 1997? Would it have garnered more support because of its proximity to, and feeding off the high-energy politics that drove *Solidarność* and the systemic transitions of 1989? Given the powerful forces in play back then, the deep political polarization and the sweeping politics of paranoia that always [drove Kaczyński](#), there is simply not enough evidence to answer these questions in the affirmative. The political polarisation and party fractions already present in the first few years after 1989 were of such an intensity that any reasonable constitutional compromise was unattainable.

Toxic constitutional brew: What drives Kaczyński ?

Jarosław Kaczyński had from the outset been a passionate opponent of anything that came out of the fateful Round Table Agreement in Magdalenka in 1989. An imaginary 1991/1992 Constitution would have been met with the same fierce resistance than the one adopted in 1997 Constitution. Kaczyński despises the III Republic born in 1989 for its original sin at birth rather than for any wrong choices and calculations made in 1990 and 1992. Declaring the Round Table Talks a sham was exactly what forged the anti-liberal, ultra-catholic and nationalistic program in governance today. Kaczyński was poisoning the public discourse with his conspiracy theories and combative discourse, hijacking the ethos and myth of the old *Solidarność* for his personal political ambitions and for his own vision of how Poland should have looked like post-1989.

One of the founding myths of Kaczyński's IV Republic project (restarted in November 2015) claims that only the few righteous and virtuous founders of the PC (mother

party of what is today's PIS) carried on the true legacy of *Solidarność* betrayed at the Round Table Talks by the Mazowieckis, Geremek, Michniks and others. While in the 90's the foundations of the new Poland were laid down and the brighter future beckoned after 50 years of living under the thumb of the Soviet oppression, the same period of time for Kaczyński and his believers was shrouded in darkness and unfulfilled ambitions. The electoral victory in 2015 and its aftermath simply released his pent-up anger and hatred toward III Republic of 1989 – 2015.

Debunking the myths and appreciating the Constitution we have

Now back to 1997 Constitution. One has to appreciate the strong claim to legitimacy that this Constitution makes, and the spirit that informed its adoption. The political and constitutional compromise that was missing in the first years post-89 was clearly on display in 1996 and 1997 during the work on the draft. The makeup of the National Assembly that adopted the Constitution on April, 2, 1997 reflected the drive for compromise. The latter brought together moderate forces of the SLD (post-communist left), UD (Democratic Union), UP (Labour Union) and PSL (Polish Peasants Party). One of the founding Fathers of this Constitution and driving force behind its celebrated preamble was Tadeusz Mazowiecki, the first non-communist Prime Minister in Eastern Europe. Who else could have better represented the spirit of *Solidarność* and the ethos of working for the common good than him?

The 1997 Constitution proved its durability at the moment of greatest national tragedy post-1945: the crash of the presidential plane in Smoleńsk in 2010). It provided a framework for orderly alternation in power and government formation, and finally anchored Poland in NATO and the European Union. Its Preamble is the best reflection of *Solidarność* as it brings together all the voices that speak for contemporary Poland. It is a document that is inclusive and inviting, never exclusive.

Granted, *Solidarność* was truly a revolutionary movement that changed history and paved the way for changes in the Eastern and Central Europe and beyond. However, *Solidarność* never delivered political goods when given a chance post-1989. Paradoxically, the great and tangible constitutional achievements of the last 27 years happened thanks to the efficient and persistent efforts by the forces that, in fact, emerged from the rubbles of the Communist Party and that were joined by the moderates that carried on the legacy of *Solidarność*'s spirit of reconciliation and compromise.

Understanding the constitution through its path

The commitments owed to a constitutional document are anchored in the past, developed and refined in the present, and carried over into the future. These three temporal dimensions are linked by the rationale of the underlying principles and values that make up the constitutional identity and must be interpreted to ensure both the continuity of the messages contained therein and their durability. What is needed is an equilibrium between necessary change that embraces the *new* and

stability that caters to the *traditional*. In other words, constitutional interpretation must strive both for the *conservative* (preserving the values) and the *reformative* (reading these in the light of ever-changing circumstances). The future will then emerge at the intersection of both perspectives. This temporal understanding underscores an aspirational function of a constitutional document: it aspires to reflect the country in the best, albeit imperfect way, to capture this reflection, and yet it will never achieve this goal in a definite and final way, since society not only changes and evolves along with the document but is also always constrained by baggage of the past.

Each generation must undertake its own distinctive role in spelling out what the constitutional pact mandates. Constitutional fidelity underpins this process and arises at the intersection of practice, text, interpretation, and culture. In this sense, constitutional fidelity is about a generational reading of the document, not uncritical iconoclasm. It is about pragmatic recognition that our constitutional allegiances are shaped, reshaped, and re-examined as the world around the constitution changes and fluctuates. There is no place for fear of failure because failure is a part of fidelity. No constitution is perfect. Fidelity is about the journey and the process rather than a final destination. Each generation should build on the best of the past and progress with this knowledge. Constitutional pacting is at its best when people (not only lawyers) see themselves as part of the constitutional process from nation-building through self-discovery to nation-sustaining and growth. Fidelity is not about logic but instead a sense of belonging, emotion, tradition, and history. These factors combined define the contours and durability of the fidelity to the constitution and provides a chance to advance as a nation of all, not only chosen ones. True constitutional fidelity never comes down as a blessing from the empowered but is born and thrives in peoples' hearts. Fidelity to the Polish Constitution should be an expression of loyalty to the great moments in Polish history that are marked by a plurality of voices and respect for the other with the Polish tradition of openness and tolerance. The 1997 Constitution is only part of this tradition. Elements of tolerance – rule of law, democracy, freedoms and rights, a functioning system of judicial protection, and a constitutional court with a strong record of human rights protection – are built on the tradition of limited government, separation of powers, centrality of the individual, and respect for self-imposed rules. This is where the unifying potential resides.

Finally, a constitution that aspires to be “good” must not only engage with aspiration and pacting, but also command respect *via* constitutional context. A good constitution helps to build a constitutional context defined by the lower courts' application of the Constitution in individual cases. Once citizens start seeing that their constitutional rights and freedoms are real and effective (*context*), the rights are not merely illusory (*text*), and that courts translate the *text into context*, important transformations will happen. The citizens will not only be willing to stand up for a constitution, but most crucially, they will understand why this constitution and the institutions must be defended.

A constitution is well-designed to ensure stable democracy when the elites' project meets and is enforced by what [S. Levitsky and D. Ziblatt](#), call strong informal norms and practices that prevent the democracies from self-destructing. They

argue that “like a pickup basketball game without a referee, democracies work best when unwritten rules of the game, known and respected by all the players, ensure a minimum of civility and cooperation. Norms serve as the soft guardrails of democracy, preventing political competition from spiralling into a chaotic, no-holds-barred conflict”. A constitution is good for citizens not because it promises the moon or engages with the strategy of generous give-aways (this was an underlying assumption of communist paper constitutions that promised a lot yet never delivered). A good constitution protects citizens against the authorities’ arbitrariness.

Unless citizens want to complete an obituary for the rule of law in 2019, the challenge should be clear. Improving constitutional safeguards against the excesses of any majority is of the utmost importance but insufficient. Instead, it is necessary to move beyond *text* and on to building the *context* in which a constitution will prosper. This context would rely on citizens approving the bottom-up constitutional design, showing citizens how the institutions work, explaining the importance of an independent judiciary and the rule of law, and demonstrating how the constitution matters in their daily lives. The constitution strengthened *via* context would become internalized in citizens’ hearts and minds. Such transformation would serve as the best precaution against any authoritarian-prone governments and parliaments. Capture in Poland has been so deadly effective due to a lack of constitutional context and minimal internalization of the constitution by citizens.

While democracy tells how to gain political power and implement the political agenda, constitutionalism puts a premium on learning how to govern in the culture of limited government, restraint, and responsibility for the common good. Constitutionalism is about limited government and controlling state power by legal means. The resentful constitutions of fear must be challenged by a narrative built around “a good constitution”.

A good constitution not only empowers but also delimits and sets the boundaries where power is to be exercised. It helps build and sustain liberal platforms of equal citizens. Democracy thrives on many voices, and a good constitution reflects this multiplicity. “A good constitution” is anchored in the most cherished of reservoirs – the hearts and minds of citizens. As soon as that happens, the politics of resentment face a new powerful adversary in the form of conscious and engaged citizenry.

When the constitutional order is captured, popular support could provide a critical emergency mechanism to prevent its destruction. Kim Lane Scheppele spoke of “[successful constitutions](#)” and argued that they manage to create their own social life by “naturalising, channelling and/or legitimating power”. They “extend the idea of constitutionalism beyond any constitutional text and beyond the directly regulated political classes into a broader social world in which constitutional ideas shape social expectations and understandings, and come to be taken for granted. They rely on a general understanding of constitutionalism both in the political elite and in a broader public. Her insights help explain the importance of what I would call “constitutional life on the ground”. Indeed if there is one thing authoritarians like Orbán and Kaczyński fear, it is the voice and constitutional engagement that come from within the civil society.

The 1997 Constitution as a focal point for constitutional resistance

The Constitutions could create democracies after a non-democratic time. But, the law alone is insufficient to build a stable democracy. The rule of law and democracy must be internalized at the behavioral level. The important study of regimes needs to be complemented by studying the attitudes of people subject to a democratic rule. How do they respond to democracy? How do they define it? How do they internalize democratic values? These questions merit close attention as further encroachments by the politics of resentment continue. There is no democracy without democrats, and the democracy on the periphery provides an example of a regime in which hybridity is reinforced by the ambivalent incoherence of individuals. The latter group struggles to internalize all the democratic rules (inclusion, tolerance, respect for the other, and constitutional culture). Their understanding of the democratic processes is superficial and shallow. It comes down to voting in four-year electoral cycles. There has not been much knowledge beyond the ballot-box in terms of constitutional culture, which is understood as non-judicial actors' beliefs and values about the constitution.

The 1997 Constitution is a „a good Constitution“. It is a Constitution that encapsulates the spirit of *Solidarność* both in terms of pedigree and content. The authoritarian policies of the current government are antithesis of what was the most precious about the *Solidarność* movement that rose in the 80-s and triumphed in the 1989. The 1997 Constitution is a constitution of an open society and is therefore begrudged by the politics of resentment. It has survived because it is based on a compromise among competing world-views and invites all to join in the journey. Constituents must never let the resentful government, or any other would-be authoritarians, tell them it is any different. This Constitution deserves to be defended.

